

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF ALABAMA
SOUTHERN DIVISION**

KATHRYN BAUMAN RUBENSTEIN,)

Plaintiff,)

v.)

BETTY JO BAUMAN, et al.,)

Defendants.)

**CIVIL ACTION NO.
1:07cv798-MHT**

**MOTION TO DISMISS
COMPLAINT AND FIRST AMENDED COMPLAINT**

Pursuant to Rule 12(b)(6), FED.R.CIV.P., defendant Community Bank & Trust of Southeast Alabama (“CB&T”), identified in the plaintiff’s Complaint as defendant Number 57, moves this Court to dismiss the Complaint and the First Amended Complaint for failure of the plaintiff to state any claim against CB&T upon which relief can be granted. In support of its motion, CB&T says as follows:

1. CB&T’s Motion to Dismiss is timely because it is filed within 20 days of service on CB&T by certified mail of the Summons and Complaint and First Amended Complaint (the “Complaints”) in this action. CB&T is aware of this Court’s Order of September 13, 2007, requiring the plaintiff to file a Second Amended Complaint by October 4, 2007, but because CB&T’s response to the Complaint and First Amended Complaint are due prior to October 4, 2007, CB&T proceeds timely to file this motion in response to the pending Complaints.

2. The plaintiff’s Complaint and First Amended Complaint fail to allege any facts or claims as to CB&T to support any claim for relief. *See* Complaint and First Amended Complaint. The only reference to CB&T is found in the Complaint on page 11 at paragraph 57. *See* Complaint. There, the plaintiff states, “Defendant, CB&T Bank, is an Alabama Corporation

operating in Enterprise, Alabama.” *Id.* The plaintiff fails to make any further statements, either in the Complaint or First Amended Complaint, of any facts, claims, causes of action, allegations, acts or omissions, or legal theories with respect to CB&T. *See* Complaints. In the absence of any allegations or pleadings that set forth any claim or possible claim upon which relief for plaintiff can be granted against CB&T, the Motion to Dismiss is due to be granted. *See e.g., Glover v. Liggett Group, Inc.*, 459 F.3rd 1304, 1308 (11th Cir. 2006) (dismissal is appropriate where plaintiff can prove no set of facts to support the claims of the complaint).

3. CB&T further responds that the plaintiff has a pending state court action (CV 2002-5063, Houston County Circuit Court) in which she sought to add CB&T as a defendant in October 2006 pursuant to belated and improper amendments to her complaint in that action. Upon information and belief, CB&T will be dismissed from the state court action by a written order to be entered by Judge Smithart based upon his instructions at the hearing in the state court action on September 5, 2007. In the event the plaintiff intends to allege against CB&T in this action, or hereafter alleges against CB&T in any second amended complaint in this action, any claims that she asserted or could have asserted against CB&T in the state court action, the plaintiff’s Complaints against CB&T are due to be dismissed pursuant to the doctrine of “prior pending action,” as codified at §6-5-440, CODE OF ALABAMA (2005 Repl.Vol.). *See e.g., Ex parte Metropolitan Prop. & Cas. Ins. Co.*, ____ So.2d ____, 2007 WL 1576078 (Ala.Sup.Ct. June 1, 2007).

4. CB&T reserves its rights to seek sanctions against the plaintiff and reimbursement of its attorneys’ fees and expenses under Rule 11, FED.R.CIV.P., and 42 U.S.C. §1988(b).

WHEREFORE, PREMISES CONSIDERED, CB&T prays that this Court will grant its Motion to Dismiss. CB&T prays for such other and further relief that this Court deems appropriate.

Respectfully submitted,

/s/ Anne Stone Sumblin

Anne Stone Sumblin (STO 038)

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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of September, 2007, I electronically filed the foregoing with the Clerk of Court using the CM/EMF system which will serve notification of such filing on the following:

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